FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 8 1991
OFFICE OF THE CLERK

No. 90-5551

In The

# Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.,

*Petitioner,*

v.

ARIZONA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Arizona**

## PETITIONER'S REPLY BRIEF

JOHN M. BAILEY
JOHN R. HANNAH
*DENISE I. YOUNG
Arizona Capital
Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
(602) 965-8185
*Counsel of Record

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

I. PETITIONER'S CLAIMS WERE NOT WAIVED .. 1

II. RESPONDENT'S ONE OFFENSE RATIONALE IS IRRECONCILABLE WITH DUE PROCESS AND SIXTH AMENDMENT GUARANTEES ... 3

A. Petitioner Received Neither a Unanimous Jury Verdict Nor an Agreement by a Substantial Majority ..... 3

B. Premeditated Murder and Felony Murder are Two Distinct Offenses ..... 4

III. RESPONDENT MISUNDERSTANDS THE HOLDING IN *BECK V. ALABAMA* ..... 7

CONCLUSION ..... 10

TABLE OF AUTHORITIES

Page

CASES:

*Apodaca v. Oregon*, 406 U.S. 404 (1972) ..... 3, 4

*Ballew v. Georgia*, 435 U.S. 237 (1978) ..... 4

*Beck v. Alabama*, 447 U.S. 625 (1980) ..... 3, 7, 8

*Brooks v. Tennessee*, 406 U.S. 605 (1972) ..... 9

*Burch v. Louisiana*, 441 U.S. 130 (1979) ..... 4

*Caldwell v. Mississippi*, 472 U.S. 320 (1985) ..... 2

*Comer v. Arizona*, 779 P.2d 333 (1990), *petition for cert. filed*, U.S. (January 18, 1991) ..... 6

*Harris v. Reed*, 109 S.Ct. 1038 (1989) ..... 2

*Hopper v. Evans*, 456 U.S. 605 (1982) ..... 7

*Johnson v. Louisiana*, 406 U.S. 356 (1972) ..... 3, 4, 6

*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) ..... 9

*Michigan v. Long*, 463 U.S. 1039 (1983) ..... 2

*Roberts v. Louisiana*, 428 U.S. 325 (1976) ..... 7

*Simmons v. United States*, 390 U.S. 377 (1968) ..... 9

*State v. Axley*, 132 Ariz. 383, 646 P.2d 268 (1982) ..... 5

*State v. Boots*, 308 Or. 371, 780 P.2d 725 (1989) ..... 2, 4

*State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983) ..... 1

*State v. Clayton*, 109 Ariz. 587, 514 P.2d 720 (1973) ..... 5

*State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988) ..... 5

*State v. McLoughlin*, 139 Ariz. 481, 679 P.2d 504 (1984) ..... 4



TABLE OF AUTHORITIES – Continued

Page

*State v. Minifield*, 110 Ariz. 599, 522 P.2d 25 (1974) ..... 4

*State v. Smith*, 160 Ariz. 507, 774 P.2d 811 (1989) ..... 6

*State v. Walton*, 159 Ariz. 592, 769 P.2d 1017 (1989) *aff'd on other grounds, Walton v. Arizona*, 110 S.Ct. 3047 (1990) ..... 5

*Stevenson v. United States*, 162 U.S. 313 (1896) ..... 9

*United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990) ..... 2

*United States v. Peterson*, 768 F.2d 63 (2nd Cir.) *cert. denied*, 474 U.S. 923 (1985) ..... 2

*United States v. Salvucci*, 448 U.S. 83 (1980) ..... 9

*United States v. Schmuck*, 489 U.S. 705 (1989) ..... 8

Most of respondent's arguments are adequately addressed in petitioner's opening brief. This Reply, therefore, addresses only those contentions made in respondent's brief which were not directly addressed in the opening brief.

## I. PETITIONER'S CLAIMS WERE NOT WAIVED.

Respondent asks this Court for the first time not to review the jury "unanimity" issue on which this Court has granted certiorari on the theory that this issue was waived by trial counsel's failure to object to the verdict forms at tria1.[1] This Court need only read the opinion below to conclude that respondent is flatly wrong. This is because the Arizona Supreme Court fully reviewed the merits of the jury unanimity issue petitioner has raised here. Nowhere does the Arizona Supreme Court find this issue waived. JA at 40-41.

---

[1] Respondent also urges this Court not to review petitioner's claim that he was entitled to a lesser included instruction on theft because this issue was not raised on direct appeal. Respondent misunderstands petitioner's argument. The trial court's refusal to instruct the jury on the lesser included instruction of theft is not raised here as a separate claim. Rather, we simply note that because the evidence at his trial supported a conviction for robbery, JA at 40, and, as a matter of law, theft is a lesser included offense of robbery, *State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983), petitioner would have been entitled as a matter of state law to a lesser included instruction for theft but for Arizona's automatic rule that there are no lesser included offenses of felony murder. A theft instruction was particularly warranted here where the evidence presented against petitioner at trial supported, at best, no more than a theft conviction.

It is only where a state court makes a plain statement relying on adequate and independent state grounds for its decision that review by this Court is barred. A state court's complete silence is not a "plain statement" that "clearly and expressly" relies on a state procedural default as a separate, adequate, and independent state ground for denying relief. *Michigan v. Long*, 463 U.S. 1039 (1983); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Harris v. Reed*, 109 S.Ct. 1038, 1045 (1989). Since the Arizona Supreme Court reviewed the jury "unanimity" issue on the merits, with no mention of procedural default, this Court's review is neither waived nor limited.[2]

[2] The cases Respondent cites do not support his argument for a limited review for plain error of this issue. In the two federal cases respondent relies on, *United States v. Bedonie*, 913 F.2d 782 (10th Cir. 1990), and *United States v. Peterson*, 768 F.2d 63 (2nd Cir.), *cert. denied*, 474 U.S. 923 (1985), the appellate court chose to limit its review of the jury unanimity issue based on trial counsel's failure to object to the verdict forms in the federal trial court. Petitioner has no quarrel with those decisions; they are simply irrelevant here where no waiver finding was made by the Arizona Supreme Court and review of the issue was not limited. The state case respondent relies on for this same proposition, *State v. Boots*, 308 Or. 371, 780 P.2d 725 (1989), says nothing about waiver or limited review of the jury unanimity issue. Like the Arizona Supreme Court here, the Oregon Supreme Court fully reviewed the issue.



## II. RESPONDENT'S ONE OFFENSE RATIONALE IS IRRECONCILABLE WITH DUE PROCESS AND SIXTH AMENDMENT GUARANTEES.

### A. Petitioner Received Neither a Unanimous Jury Verdict Nor an Agreement by a Substantial Majority.

Respondent argues that unless this Court is willing to overrule *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), jury unanimity cannot be constitutionally required in capital cases. Resp. Br. at 11, 34. That is not so.

*Johnson* and *Apodaca* do not address, much less decide, whether jury unanimity is constitutionally required in capital cases. *Johnson* and *Apodaca* merely held that in *non*capital cases, a verdict returned by at least a 75% majority of the jury did not offend due process or sixth amendment principles.

*Johnson* did not reject, as respondent contends, any relationship between the reasonable doubt standard and jury unanimity; it simply found that relationship insufficient basis to require unanimous jury verdicts in state noncapital cases where a substantial majority of the jury agrees on the defendant's guilt. But a capital case is a different matter altogether – because in a capital case, the constitutionally tolerable risk of factual error is less. *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

Even if capital cases did not require *unanimous* verdicts, the verdict returned against petitioner in this case would be unconstitutional under *Johnson* and *Apodaca*. There is no assurance that petitioner's jury did anything

more than divide equally on the respective factual findings necessary for conviction of premeditated murder and felony murder. That certainly is not a verdict of a "substantial majority of the jury" – the constitutional minimum required under *Johnson* and *Apodaca* even in noncapital cases. *Johnson*, 406 U.S. at 362. *See also Ballew v. Georgia*, 435 U.S. 237 (1978); *Burch v. Louisiana*, 441 U.S. 130 (1979).

### B. Premeditated Murder and Felony Murder are Two Distinct Offenses.

Although premeditated murder and felony murder have different elements, respondent argues that these crimes nevertheless are "one" because the premeditation element of premeditated murder is "supplied" by the intent required for the underlying felony element of felony murder. Resp. Br. at 22. Legally and factually, that argument is wrong.

Elements of offenses cannot be substituted for one another. The elements of premeditation, deliberation and wilfulness that are essential to the crime of premeditated murder are not elements of felony murder. *State v. Minifield*, 110 Ariz. 599, 522 P.2d 25 (1974). On the other hand, felony murder – but not premeditated murder – requires proof that the defendant had the requisite intent to and did commit the specified underlying felony. *State v. McLoughlin*, 139 Ariz. 481, 485, 679 P.2d 504 (1984).

Thus, premeditated murder and felony murder also differ in the ultimate factual findings required for conviction. See *State v. Boots*, 308 Or. 371, 780 P.2d 725, 727 (1989) (robbery felony murder with intent to kill and



killing that occurs to conceal the identity of the robbers are factually different and jury required to reach unanimous decision on element required by each subsection of statute). Indeed, respondent concedes as much when it discusses the "alternative acts" of the two offenses. Resp. Br. at 20, 22.

In practice, not even the Arizona courts take the "one offense" proposition seriously. Thus, in *State v. Lopez*, 158 Ariz. 258, 266, 762 P.2d 545, 553 (1988), the Arizona Supreme Court reversed the defendant's "one offense" conviction of "first degree murder" when it found insufficient evidence to sustain a felony murder conviction. Although the jury had been instructed on both premeditated murder and felony murder and returned a "one offense" verdict of "first degree murder," the court remanded the case for a new trial on premeditated murder only. So, too, have Arizona trial courts recognized the factual difference between the two offenses. In *State v. Axley*, 132 Ariz. 383, 391, 646 P.2d 268, 276 (1982), the trial court directed a verdict on premeditated murder at the close of the state's case and instructed the jury only on the separate elements of felony murder. This same result was reached in *State v. Clayton*, 109 Ariz. 587, 514 P.2d 720 (1973), where the trial court granted the state's motion to dismiss the first count of premeditated murder at the close of the state's case and instructed the jury on only the second separately indicted count of felony murder arising out of the same incident.[3]

---

[3] More recently, at the urging of the Arizona Supreme Court, *State v. Walton*, 159 Ariz. 592, 594, 769 P.2d 1017, 1038-40 (1989) (Feldman, V.C.J., and Moeller, J., concurring), *aff'd on*

The logical consequences of respondent's "one offense" argument would be astounding. According to that argument, the state could lump all "class four" felonies under one statute titled "Class Four Felony"; charge the defendant with that "one offense"; and obtain a conviction as long as each of the jurors chose at least one of the several offenses identified as a class four felony. By doing so, the state would eliminate the constitutional requirement of jury agreement on the facts essential to prove *any* of the factually distinct felonies contained in the "offense". If *Johnson* and its progeny require anything, they certainly require more than a general verdict that a defendant committed some unspecified felony.[4] At the very least, the Constitution requires that the state prove beyond a reasonable doubt every fact that the law has defined as essential to the particular crime. Petitioner asks no more than that.

---

*other grounds, Walton v. Arizona,* 110 S.Ct. 3047 (1990), Arizona trial courts have been doing what petitioner asks be done here: giving juries two forms of verdict for the two offenses. See *State v. Smith,* 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989) (jury instructed on both premeditated murder and felony murder returned verdict of felony murder).

[4] Respondent also contends that requiring the jury to unanimously agree on the factual elements of premeditated murder and felony murder creates jury confusion. Resp. Br. at 23. In fact, the opposite is true. *Comer v. Arizona,* 779 P.2d 333 (1990), *petition for cert. filed,* ___U.S. ___ (January 18, 1991) (jury note asking whether ten votes for premeditated murder and two votes for felony murder was a unanimous verdict); *State v. Smith,* 160 Ariz. at 513, 774 P.2d at 817 (jury given two forms of verdict on premeditated murder and felony murder and returned guilty verdict of felony murder).



## III. RESPONDENT MISUNDERSTANDS THE HOLDING IN *BECK V. ALABAMA.*

Respondent argues that *Beck v. Alabama,* 447 U.S. 625 (1980), requires only that a trial court, in a death penalty case, permit the jury to consider *some* noncapital offense, and that this requirement was satisfied in this case by the giving of a second degree murder instruction. The problem with this argument is that it incorrectly assesses the holding in *Beck.*

The holding in *Beck* was based on this Court's concern for "rules that diminish the reliability of the guilt determination" in capital cases. *Beck,* 447 U.S. at 638. The idea behind *Beck* is that a jury which might have a reasonable doubt about an element of the state's capital case should be given an opportunity to find the defendant guilty of a lesser included offense, rather than being forced to choose between a potentially unreliable capital conviction and outright acquittal. The test for determining whether *Beck* is satisfied is not the number of options given to the jury, see *Hopper v. Evans,* 456 U.S. 605, 611 (1982); *Roberts v. Louisiana,* 428 U.S. 325, 334-35 (1976) (plurality opinion); it is whether the instructions respond to the elements of the offense that may be in doubt in the state's capital case.

In this case, the evidence was clear that petitioner was in possession of the victim's property, but it left considerable doubt regarding whether, or under what circumstances, petitioner killed the victim. The trial court's instructions denied those jurors who may have doubted that petitioner killed the victim the option of convicting him of a lesser included offense, the elements

of which did not include a killing. The instructions thus denied those jurors the opportunity, required by *Beck*, to return a verdict in conformity with their reasonable view of the evidence.

Respondent seems to suggest that *Beck* only requires the giving of "lesser included offense" instructions in capital cases, and that robbery was not a lesser included offense in this case. But even if respondent's interpretation of *Beck* were correct, respondent's conclusion would not follow. This is because robbery plainly *was* a lesser included offense of murder in the perpetration of a robbery, one of the capital offenses with which petitioner was charged.[5]

Respondent also argues that *Beck* requires a lesser included offense instruction in capital cases only when the evidence supporting such an instruction emanates from the defendant. Resp. Br. at 34. Respondent argues, in effect, that to obtain a lesser included offense instruction in a capital case, a defendant must *submit* evidence sufficient to permit a rational juror to convict him of the lesser offense. This position is incorrect for three reasons.

First, petitioner *did* present evidence, by way of cross examination, from which the jury could find that he committed a robbery, but not a felony murder. Second, even if respondent's view of "presenting" evidence were correct, forcing a defendant to present evidence to obtain

---

[5] Even if robbery had been only a "necessarily included offense," *Beck* and *United States v. Schmuck*, 489 U.S. 705 (1989), would have required the giving of a robbery instruction in this case.



a lesser included offense instruction would be constitutionally impermissible. Such a rule would contravene the defendant's fifth amendment right against self-incrimination and would create the "intolerable" situation in which "one constitutional right [would] have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). *Accord United States v. Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz v. Cunningham*, 431 U.S. 801, 806-07 (1977); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972). Third, respondent's argument ignores the fact that it is the *state's* burden to prove every element of the offense charged beyond a reasonable doubt.

Where more than one inference can be drawn from the evidence, regardless of who presents it, it is for the jury, and not the court, to determine which inference should be drawn. "The evidence as to [the lesser included offense] need not be uncontradicted or in any way conclusive" before the jury should be charged regarding that offense. *Stevenson v. United States*, 162 U.S. 313, 315 (1896). "So long as there was some evidence" relevant to the lesser included offense, "the credibility and force of such evidence must be for the jury, and cannot be [a] matter of law for the decision of the court." *Id.*

In capital prosecutions based on circumstantial evidence that permits conflicting inferences, both the state and the defendant must be allowed to urge the jury to find whatever favorable set of facts the conflicting inferences will support, and the jury must be allowed to return the full range of verdicts legally implicated by those facts. In the instant case, petitioner's conviction

must be reversed because the jury did not have the option of convicting him of robbery instead of murder.

## CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

JOHN M. BAILEY
JOHN R. HANNAH
*DENISE I. YOUNG
Arizona Capital
Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287
(602) 965-8185
*Counsel For Petitioner*
*Counsel of Record